ORIGINAL

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20026

In the Matter of:	)	
	)	
Petition of the People of the State of California	)	
and the Public Utilities Commission of the State	)	PR Docket 94-105
of California to Retain Regulatory Authority Over	)	
Intrastate Cellular Service Rates	)	

RECEIVED
JUL - 5 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

OPPOSITION TO PETITION FOR RECONSIDERATION

BellSouth Corporation, BellSouth Cellular Corp., and Bakersfield Cellular Telephone Company[1] (collectively "BellSouth"), hereby oppose the petition for reconsideration ("Petition") filed by the Cellular Resellers Association, Inc. ("CRA") on June 19, 1995, seeking reconsideration of the *Report and Order*[2] denying the Public Utilities Commission of the State of California's ("CPUC") petition to retain authority to regulate the rates for intrastate commercial mobile radio services ("CMRS"). Because the CPUC itself has not asked the Commission to reconsider its decision and CRA cannot act in the CPUC's stead, the instant Petition cannot be granted. Moreover, on the merits, the CRA provides no basis for Commission reconsideration.

---

1 Bakersfield Cellular is 100% indirectly owned by BellSouth Cellular Corp., which has an approximate 60% ownership interest in Los Angeles Cellular Telephone Company ("L.A. Cellular") the nonwireline licensee in the Los Angeles, CA MSA. Bakersfield Cellular is the nonwireline licensee in the Bakersfield, CA MSA. It previously filed comments in this proceeding.

2 FCC 95-195 (May 19, 1995).

I. BECAUSE THE FCC HAS DENIED THE CPUC PETITION AND THE STATE HAS NOT REQUESTED RECONSIDERATION, CRA'S PETITION IS NOT GRANTABLE

With the express intent of creating a uniform Federal regulatory scheme over CMRS providers, Congress, in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"),[3] amended the Communications Act to preempt state regulatory authority over "the entry of or the rates charged" for CMRS offerings. A narrow exception to this Federal preemption of state regulation was carved out for states wanting to retain rate authority — if certain prescribed conditions were met. Specifically, Section 332(c)(3)(B) of the Budget Act provides that:

> If a *State* has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such *State* may . . . petition the Commission requesting that the *State* be authorized to continue exercising authority over such rates. . . . The Commission shall review such petition in accordance with the procedures established within 12 months after such petition is filed, and grant such petition *if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii).*[4]

Thus, Congress established a procedure for the states to request an exception to FCC preemption of rate regulatory authority and, in the event of a denial, to petition for reconsideration. Other parties were *not* given the authority to petition the Commission to continue rate regulation (either in the first instance or on reconsideration) in place of a State. In fact, in the CMRS proceedings to implement the Budget Act, the Commission itself confirmed the need for state action by declaring that "any such petition should be acceptable *only if the state agency making such filing certifies that it is the duly*

---

[3] Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002.

[4] 47 U.S.C. § 332(c)(3)(B)(emphasis added).

authorized state agency responsible for the regulation of telecommunications services provided in the state." [5]

The State of California (through the CPUC) took the first step to retain its authority to regulate CMRS rates by timely submitting a petition to the Commission. Upon denial of its petition by the Commission, however, the State of California declined to take the second step by petitioning for reconsideration of the *Report and Order*. The State's determination not to seek regulatory authority is conclusive and there is no basis for granting CRA's Petition. The CRA cannot come to the Commission to gain rate authority for a State when the State in question has not itself made the necessary filing. Both the statute and legislative history are clear that it must be the State that comes to the Commission for authority to regulate rates within the borders of that state.[6]

Once the CPUC did not avail itself of the opportunity to petition for reconsideration, CRA's filing could not be decisionally significant because its rights are wholly derivative of the CPUC. (CRA nowhere contends that it is an authorized agent for the state of California.) CRA's position is comparable to that of an intervenor in an appellate case. The rights of an intervenor are derivative of those of the appealing party.

---

[5] *See Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order*, GN Docket No. 93-252, 9 FCC Rcd. 1411, 1504 (1994)(emphasis added)("*CMRS Second R&O*").

[6] Indeed, the legislative history of the Budget Act reflects the Committee's clear intention to "permit[] *states* to petition the Commission for authority to regulate rates . . . ." H.R. Rep. No. 111, 103d Cong., 1st Sess. 261 (1993) (emphasis added).

If the appellant decides to drop out of the proceeding, the intervenor loses its position to comment in the case and cannot step into the shoes of the appellant.[7]

Thus, the CRA Petition cannot be granted. Where the Commission has denied a state petition to extend rate regulatory authority, there is a threshold filing requirement that the state (or authorized agent thereof) petition for reconsideration. That requirement has not been met here. The authority conferred on the states by the Budget Act to request continuing rate regulatory authority is personal to the CPUC and CRA's Petition cannot be granted.

II. IN ANY EVENT, NEITHER THE CPUC'S PETITION NOR CRA'S ARGUMENTS MEET THE SUBSTANTIAL BURDEN OF PROOF REQUIRED BY THE BUDGET ACT TO SUPPORT CONTINUED RATE AUTHORITY

Assuming *arguendo* that CRA could petition for reconsideration in this case, a review of the CRA Petition demonstrates that it has not "cleared the substantial hurdles" enunciated in the Budget Act for continued State rate jurisdiction.[8] Under the Budget Act, States petitioning for authority to regulate CMRS rates must satisfy a substantial burden of proof. A petitioning State must demonstrate either that:

> (1) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> (2) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.[9]

---

[7] *See Illinois Bell Telephone Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990).

[8] *CMRS Second R&O*, 9 FCC Rcd. at 1421.

[9] 47 U.S.C. § 332(c)(3)(A). *See also CMRS Second R&O*, 9 FCC Rcd. at 1504.

Thus, a State must do more than show that market conditions for cellular services (as in the case of the CPUC petition) "have been less than fully competitive in the past."[10] Rather, as recognized by the Commission, a State must show that "given the rapidly evolving market structure in which mobile services are provided, the conduct and performance of CMRS providers ill-serve consumer interests by producing rates that are not just and reasonable, or are unreasonably discriminatory."[11]

The CPUC did not meet the necessary burden and simply submitted time-worn arguments regarding the government's implementation of the duopoly structure for cellular service and the existing state of wireless competition. The CPUC failed to account for competitive changes to the "duopoly" cellular market structure in California due to the imminent advent of Personal Communications Services ("PCS") and other wireless services.[12] Additionally, the CPUC provided no evidence of anticompetitive practices regarding the provision of any CMRS offering or evidence of widespread consumer dissatisfaction in the state. Thus, in its *Report and Order*, the Commission properly found that:

---

10 *Report and Order*, FCC 95-195, at para. 15.

11 *Id.*

12 In its report finalizing the Budget Act, the House Committee on the Budget emphasized that in implementing Section 332(c)(3), the Commission should "be mindful of the Committee's desire to give the policies embodie[d] in Section 332(c) an adequate opportunity to *yield the benefits of increased competition and subscriber choice anticipated by the Committee*." H.R. Rep. No. 111, 103d Cong., 1st Sess. 261-262 (1993) (emphasis added). Thus, in determining that the Commission, and not the states, should govern CMRS rate and entry issues, Congress was aware of the cellular duopoly structure as well as the advent of alternate wireless services.

- The CPUC failed to satisfy the statutory standard established by Congress and implemented by the Commission for extending state regulatory authority over CMRS rates;
- The CPUC's analysis of the CMRS marketplace did not properly reflect the rapidly changing CMRS market structure and evolving cellular services;[13]
- No evidence of pricing collusion among cellular providers was provided by the CPUC;
- Cellular rates are declining in California; and
- The CPUC provided no evidence of widespread consumer dissatisfaction.

Remarkably, CRA's Petition concedes that there is inadequate evidence to support the CPUC's original request for continued rate regulatory authority over CMRS providers.[14] Indeed, recognizing that the CPUC did not meet the statutory standard, CRA

---

[13] For example, as the Commission stated in its *Report and Order*, "PCS activity is undeniably real. It is not something that 'may' occur, or that will occur sporadically. It *is* happening, and it is happening on a nationwide scale." *Report and Order*, FCC 95-195, at para. 33 (emphasis in original). In fact, since the CPUC filed its petition in August of 1994 the Commission has auctioned and awarded 99 MTA PCS licenses. *See Applications for A and B Block Broadband PCS Licenses, Order*, DA 95-1411 (W.T.B. June 23, 1995). Additionally, Nextel has already constructed a system which will serve as a competitive alternative to cellular service in areas of California. *PCS: Can we talk?*, Data Communications, March 21, 1994, at 13.

[14] *See* CRA Petition for Reconsideration at 4-5:

> A state [such as California] proposing to retain regulatory authority will obviously be unable to provide the same level of evidence -- or indeed any evidence at all -- of such anticompetitive behavior, consumer dissatisfaction, and other indicia of marketplace failure.
>
> * * *
>
> [The CPUC] regulatory environment has required the cellular carriers to provide reasonable and nondiscriminatory rates for intrastate service.

is reduced to requesting that the Commission hold the CPUC to a lesser standard than that prescribed by the Budget Act. CRA provides no basis for such an exception to the statutory requirement, and none exists.

Moreover, rather than directly challenging the FCC rulings in the *Report and Order*, CRA's petition is centered on its request that the Commission allow the CPUC to retain jurisdiction over one discrete area of regulation -- complaints concerning rates for intrastate service. In the alternative, the CRA seeks a Commission ruling that the FCC will consider discriminatory rate complaints.

First, CRA's request to allow the CPUC to adjudicate rate disputes is nothing more than a backdoor attempt to involve the state in rate regulation without meeting the burdens contained in the statute. As discussed above, there is no basis for reconsideration of the Commission order denying the CPUC continued rate authority, and CRA has no right to seek such authority on the state's behalf.

Second, as to the issue of FCC jurisdiction, in its *Report and Order* the Commission stated that this issue will be addressed "in the context of [the petitions for reconsideration of the *CMRS Second Report and Order*] proceeding."[15] The Commission specifically stated that it would address the issue on reconsideration in this proceeding "only upon a showing by petitioners that resolution of the issue is necessary to resolve a *material issue* raised in this record. That showing must consist of evidence and argument

---

[15] *Report and Order*, FCC 95-195, at para. 147.

establishing such a nexus and supporting the substantive position argued *i.e.*, that we . . . have not inherited intrastate rate regulation over CMRS."[16]

CRA's Petition clearly fails to meet this standard. CRA merely complains about a "critical void in regulatory authority" and the absence of a forum for bringing discriminatory intrastate rate complaints. It provides no evidence to support these claims and it also ignores the Commission's previous commitment to protect resellers from such discriminatory practices.[17]

CONCLUSION

In the Budget Act, Congress determined that preemption of state rate authority would facilitate the development of wireless services in this country. CRA's

---

16 *Id.* (emphasis added).

17 *See Bundling of Cellular Customer Premises Equipment and Cellular Service, Report and Order*, CC Docket No. 91-34, 70 Rad. Reg. 2d (P&F) 1288, 1295 n.48 (1992).

effort to undermine the competitive deployment of services should be rejected.[18] For the reasons stated herein, the CRA Petition should be denied.

Respectfully submitted,

BELLSOUTH CORPORATION
BELLSOUTH CELLULAR CORP.
BAKERSFIELD CELLULAR TELEPHONE CO.

By: _____
L. Andrew Tollin
Luisa L. Lancetti
Georgina M. Lopez-Oña

WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 783-4141

By: _____
William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, N.E.
Atlanta, Georgia 30309-3610
(404) 249-4445

By: _____
Charles P. Featherstun
David G. Richards
1133 21st Street, N.W., Suite 900
Washington, D.C. 20036
(202) 463-4132

Their Attorneys

July 5, 1995

---

[18] It is well-established that it is not the "objective or role assigned by law to the . . . Commission" to "equaliz[e] competition among competitors." *See Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 776 (1974).

CERTIFICATE OF SERVICE

I, M. Jeanette Couch, a secretary in the law firm of Wilkinson, Barker, Knauer & Quinn, hereby certify that I have, this 5th day of July, 1995, served a copy of the foregoing "Opposition to Petition for Reconsideration," by First-Class United States Mail, postage pre-paid to the following:

Regina M. Keeney, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5002
2025 M Street, N.W.
Washington, D.C. 20554

Michael Wack, Deputy Chief
Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
Rom 644
1919 M Street, N.W.
Washington, D.C. 20554

Dan Phythyon, Sr. Legal Assistant
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5002
2025 M Street, N.W.
Washington, D.C. 20554

Ellen S. Levine
State of California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Joel H. Levy
Cohn and Marks
Suite600
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

David A. Gross
AirTouch Communications
1818 N Street, N.W.
Washington, D.C. 20036

Thomas Gutierrez
Elizabeth R. Sachs
Lucas, McGowan, Nace & Gutierrez
Suite 1200
1111 19th Street, N.W.
Washington, D.C. 20036

David A. Simpson
Young, Vogl, Harlick & Wilson
Suite 2500
425 California Street
San Francisco, CA 94101

Adam A Anderson
Bay Area Cellular Telephone Company
Suite 1500
651 Gateway Boulevard
San Francisco, CA 94080

Richard Hansen, Chairman
Cellular Agents Trade Association
Suite 201
11268 Washington Boulevard
Culver City, CA 90230

Michael B. Day
Wright & Talisman, P.C.
The Shell Building, Suite 225
100 Bush Street
San Francisco, CA 94104

Michael F. Altschul
Cellular Telecommunications Industry Association
Suite 200
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Thomas H. Bugbee
County of Los Angeles
Internal Service Department
Telecommunications Branch
P.O. Box 2231
Downey, CA 90242

Russell H. Fox
Gardner, Carton & Douglas
Suite 900, East Tower
1301 K Street, N.W.
Washington, D.C. 20005

Howard J. Symons
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
Suite 900
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Jeffrey S. Bork
U.S. WEST Cellular of California, Inc.
Suite 5100
1801 California Street
Denver, CO 80202

Leonard J. Kennedy
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037

Mark J. Golden
Personal Communications Industry
Association
Suite 1100
1019 19th Street, N.W.
Washington, D.C. 20036

Michael Sharnes
Suite 105
1717 Kettner Boulevard
San Diego, CA 92101

Judith St. Ledger-Roty
Reed, Smith, Shew & McClay
1200 18th Street, N.W.
Washington, D.C. 20036

Douglas B. McFadden
McFadden, Evans & Sill
Suite 810
1627 Eye Street, N.W.
Washington, D.C. 20006

Katherine T. Wallace
Skadden, Arps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005-2107

Lewis J. Paper
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919

Peter A. Casciato
A Professional Corporation
Suite 701
8 California Street
San Francisco, CA 94111

M. Jeanette Couch